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The Newest Trends in the Medicolegal World: A Survival Guide

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An interesting wave of change is spreading across the medicolegal theater. The purpose of this article is to inform you of these important changes and provide you with some effective solutions.

In recent months, I have heard from many of you involved in medicolegal battles. Increasingly, defense lawyers - perhaps fearing they are fighting a losing battle - have turned, in desperation, to attacking me by proxy as a means to discredit the testimony of doctors I have trained or who are relying on things I have written. Although I am both honored and amused by this new offensive, it has not been mounted without some modicum of success.

In short, the strategy goes this way: I am portrayed as a practice builder engaged in making doctors and lawyers wealthy by teaching them how to build their practices and "win cases." Selective quotes, taken out of context from our old Web site or prior advertisements, are used to suggest this. The desired upshot of it is that I am depicted not as a real researcher, scientist or educator who follows established guidelines - but rather, as one who promotes the discovery and documentation of fictitious lesions and nonexistent disability. By default, any training doctors have had with me or SRISD are not only rejected out of hand as untrustworthy, but these attorneys also attempt to brand my graduates or anyone quoting me as charlatans and hucksters by association. I have exaggerated this scenario, of course, but this is essentially their game plan.

Why have they resorted to this *ad hominem*, proxy attack? Simple: They and their "experts" cannot fight the facts and science I teach. A record number of their accident reconstructionists and biomechanists are also being struck from testifying now, largely as a result of my teaching the truth, and these defense lawyers are no doubt under great duress to save the ship, so to speak. My graduates and I seem to be their biggest headache, so they have attempted to reinvent me as their straw man.

Here is the way to handle this attack: If you have my textbook or seminar books at your deposition, offer to allow deposing attorneys to browse through them to satisfy themselves that the program is entirely science-based and well-referenced throughout, and that I do not give advice on billing strategies, and have never recommended treating beyond established best-practice guidelines. I do not even discuss maintenance care. I also strongly advise doctors: "Say what you mean, and mean what you say," as opposed to building mountains out of molehills. In fact, this kind of ethical philosophy is repeatedly expressed throughout the books I have written, which can also be brought to trial, of course.

I recommend that you turn adversity into opportunity. Rather than being attacked for your training and knowledge, you should be commended for it. Countering this, remember that their experts can and should be attacked on the basis of their lack of special training.

For those of you who have been certified in low-speed rear-impact crash (LOSRIIC) auto crash reconstruction through CRASH, remember that this certification does not qualify you as a general accident reconstructionist. You should always be clear on that point. As I have long taught, any grandiose claims on stationery or CVs will only invite attacks by the defense. However, if you understand the various equations and techniques taught, you should be allowed to discuss occupant kinematics and biomechanics, particularly in terms of LOSRIIC, even in cases where their experts may be struck by *motions in limine*. It is doubtful that their experts have been directly involved in a human subject crash test program, as you may have been. Again, these facts should be levered in your favor.

More importantly, even if you have not attended the center's programs, you alone, as a trained physician, can perform a risk assessment based on known risk factors for acute injury and late whiplash. Risk assessment, in conjunction with a thorough history, physical examination, and review of available medical and other records by a trained physician, carries much more face validity than the simple and quantitatively unreliable methods employed by most auto crash reconstructionists. Nonetheless, these "experts" have become the foundation for defense strategies.

For example, Allstate has widely distributed training videos to its numerous claims centers around the country. The video series features an actor dressed as a nerdy engineer, sporting a Sherlock-Holmes-type sleuth hat and a pocket protector. He promises to show viewers how to deal with these pesky soft tissue claims. The entire program is a frightening lesson in commercial brainwashing, and it is easy to see how otherwise uninformed claims people might be duped by it. In one sequence, our intrepid engineer sits behind

the wheel of a car that is struck from behind at several miles per hour. Then he is struck from the front. Suspiciously, we do not see what hits him, but, judging by the roll-out of no more than a few inches, and virtually no movement of his body, it clearly is not another vehicle. As one who has conducted many dozens of crashes at those speeds, I can verify the deceptiveness of that scene as cartoon-like in nature.

After watching the video series, viewers learn that all crashes without significant damage should raise a red flag. Likewise, cases should be red-flagged in which there are no "objective" findings, such as fracture, dislocation or subdural hematoma. Disc lesions are also considered suspicious, based on other clips showing orthopedic surgeons telling the viewer that back injuries can't possibly result from these crashes. And so it goes, so that the upshot of the video series is this: When one of these claims crosses your desk and it contains some "suspicious" element, you should hire an accident reconstructionist or biomechanist - or both. Then, out goes the disingenuous letter to the patient and provider: "Our evaluation of the crash showed it to be at a speed in which the 'G-forces' would have been no more than would occur by simple plopping in a chair. Therefore, it is not deemed likely to have resulted in injury . . ." Denial of service.

The long and short of the story is this, good doctors: As I and others have clearly shown, in low-speed crashes, reconstruction is not much more than a physics of bank shots. These experts can often be struck with a skillfully constructed *motion in limine*. Biomechanists are medicolegally somewhat more durable, but their weakness is their lack of consideration of real risk factors and their lack of contact with the patients. Their Achilles heel is that their assumptions must be based on the reconstructionist's questionably accurate work. What is left when the smoke and mirrors of the reconstructionist and biomechanists are removed? This is the source of panic among the insurers, I imagine. Science and medical literature no longer support them in their endeavor to hoodwink jurors with false notions of risk and recovery. Beleaguered defense attorneys are grasping at straws, it seems. (However, I should add a sobering point: In cases in which opposing counsel and their experts are naïve to this world of crash risk, these old defense tactics can still usually win the day.)

The Snares of the Cross-Exam

On a different subject, be wary of traps during cross-examination. One case in point: A doctor who went to CRASH 2000 was asked whether the book used was the same one used for CRASH 1999; he admitted that it probably was. That was mistake number one; it wasn't. If you don't know the truthfulness of a comment, don't agree to it. Ask to see the text or document before offering your comment. Similarly, never accept an

attorney's interpretation of a study or document by simply listening to a single sentence or his or her parenthetical summary of it. These are frequently taken out of context or are extracted from junk literature. Insist on reading the document before commenting on it. The scenario in this case concerned a comment made by a famous 20th-century lawyer about juries not being smart enough to get out of jury duty. This was related by Dr. Michael Freeman in the CRASH 1999 book. However, the defense attorney's insinuation, when he read it in court, was that I had written that and, apparently, the jurors in the case were not amused. Again, had the doctor insisted on examining the document, he would have saved himself some embarrassment.

This also brings up another point involving copyright. As with most authors, all of my seminar books, textbooks, and other materials are copyrighted. Defense lawyers frequently subpoena these materials and make illegal copies for themselves. While these books certainly contain nothing you need to fear, when you do see an attorney with an illegal copy of anyone's books or material, you should quickly point that out and refuse to be part of a violation of the Federal Copyright Act of 1976, Title 17. This is likely to be embarrassing to the lawyer presenting it. I should also point out that quite often, materials that are subpoenaed from you are never returned, including, but not limited to, posters, models, videotapes, books and DVDs. You have very little practical recourse for their safe return if you simply hand them over. So, what are your options?

Recently, a colleague in Florida was disposed by a State Farm attorney, who subpoenaed a crash test DVD produced by SRISD shown by the doctor to the patient. Having signed an agreement with SRISD not to loan the presentation out or allow copies to be made, the doctor rightfully refused to hand it over. The defense attorney and opposing experts were invited to view the DVD at the plaintiff lawyer's or the doctor's office at their convenience. The State Farm attorney, however, wanted a copy and filed a motion to compel with the court - which was granted - and the doctor was then threatened with contempt of court charges if he did not turn over the DVD. Our attorney spoke with the plaintiff's attorney, advising him that he file a protective order with the court. This document, signed by the judge, outlined the State Farm attorney's obligations with the DVD in terms of his not being allowed to copy it and the time and method of its safe return to the doctor.

Meanwhile, the plaintiff attorney and the doctor met with the judge and argued that the court did not have the authority to overstep Federal jurisdiction vis-à-vis the Federal Copyright Act of 1976, and further that for the doctor to be without this patient education tool - even for a day - placed unreasonable constraints on

his ability to carry on his everyday practice. They further pointed out that this DVD is commercially available. If State Farm wanted it, it could easily purchase it, just like the doctor had.

In the end, the judge determined that I was merely protecting my copyright and that the plaintiff's doctor was not obligated to lend the DVD to the defense, and rescinded the defense motion to compel. (If the judge had sided with the defense, however, the protective order would at least have assured the doctor of getting his property back in a timely manner. This advice is valid for anything that is subpoenaed, other than patient records.)

In Conclusion

It seems clear that individuals or industries that manage personal injury cases on the basis of cost-inspired internal administrative policy, based largely on what "works in court in most cases," rather than on a case-by-case need for health care, are feeling an immuring sense of claustrophobia as their long-successful strategies of dissimulation and misinformation fail at an alarming rate. It is perhaps ironic that they are now resorting in desperation to accusing honest treating physicians, researchers and educators of greed-motivated dishonesty. Because of recent work in this area by us and others, laws have been changed and landmark decisions that limit the reconstructionists' and biomechanists' testimony have been handed down, which further cripple the older defense strategies. Meanwhile, more compelling literature is being published every year which makes life increasingly difficult for the purveyors of junk science and for the so-called experts who pretend to "prove" injuries are not possible in specific car crashes. The general public is becoming increasingly aware of the CAD problem

Manufacturers are producing better head restraints and other protections, and world congresses on whiplash continue to grow and are now almost totally dominated by good science. Several national insurance consortia, including our own Insurance Institute for Highway Safety, have been very active in whiplash research, and their data serve only to underscore the real nature of this immense public health burden. We have also recently established an International Whiplash Task Force, composed of a blue-ribbon panel of experts from around the world.

The hectoring and heavy-handed methods of these attorneys can be reversed or dismantled at least as often as they succeed and should not be of great concern to physicians treating these patients. The fact that opposing counsel files a motion to limit your testimony can hardly be taken as a sign of contempt. On the contrary, it is a sign of his/her respect for your knowledge and concern that your testimony might undermine

the credibility of his/her experts. These motions can most often be beaten, anyway. I should also point out that in these new attacks I've mentioned, whereby the defense attempts to divert the jurors' attention from the real facts of the case by insinuating the doctor's ethics are suspect, these same doctors who inform us of their travails are telling us that the jury settlements have generally been quite favorable, nevertheless. So, while I never suggest a monetary value or target for these claims, it clearly implies that these diversionary defense strategies are frequently ineffective in preventing fair reimbursement for health care services and reasonable compensation for special damages.

Finally, I remind you that your primary duty as a physician is to help these patients recover from their physical injuries. You are not a patient advocate, although you are sometimes required to provide truthful and objective testimony in forensic cases. Evidence that you can achieve significantly better long-term outcomes than is possible through the traditional medical model continues to mount, and there is no reason at all why you should not strive to establish a large, ethical practice to reach and help more of these victims of CAD trauma. With the current average CAD outcome at a dismal 40 percent to 50 percent chronicity rate, it is, after all, in the public's best interest. There is nothing unsavory about helping people in pain and in having a thriving practice. Even defense lawyers want new business. The game plan is changing, but I see it as a very positive sign indeed.

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